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Human Rights and the Workplace in a Global Market Economy

Human Rights in Labor and Employment Relations: International and Domestic Perspectives, Edited by James A. Gross and Lance Compa, Champaign: Labor and Employment Relations Association, LERA Research Volume, 2009, 236 pp., ISBN 978-0913447-98-7.

David Mangan

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NOTE CRITIQUE / REVIEW ESSAY

Human Rights and the Workplace in a Global Market Economy

Human Rights in Labor and Employment Relations: International and Domestic Perspectives

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Human rights have stepped into a breach in labour relations. The short collection of essays contained in *Human Rights in Labor and Employment Relations*¹ is premised on this assertion. The contributors contemplate how these areas have come together. A tone of exhaustion within the essays suggests not only a level of frustration with the history of lethargic movement to connect these two fields but also vexation with the problems occurring while the connections are being made. The valiant premise of this collection is the establishment of a “firm theoretical foundation grounded in the reality of labor activism and advocacy in a market-driven economy.”²

How the combination of labour relations and human rights has arisen remains no small matter. A leading work on the combination contended the “status of workers’ rights in a country is a bellwether for the status of human rights in general.”³ The combination of human rights and employment relations also relies on the idea of work as a “vehicle which admits a person to the status of a contributing, productive, member of society ... being engaged in something worthwhile.”⁴ Work satisfies the individual’s need for autonomy where autonomy is now being spoken of using the language of human rights. Connecting human and labour rights involves the combination of legal with the ethical and moral dimensions.⁵ Ostensibly the coupling forms a powerful tool: the consideration of human rights in employment relations brings to the fore legal entitlements which incorporate social rights. The International Labour Organization has identified the rise of human rights awareness within the “changing social consciousness.”⁶ Recent investigations of labour relations’ connection to human rights have centred on trade union activities: the Supreme Court of Canada’s decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*⁷ and the Ontario Court of Appeal ruling in *Fraser v. Ontario (Attorney General)*.⁸ In 2009, the European Court of Human Rights ruled in *Demir and Baykara v. Turkey*⁹ that “the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’”.¹⁰ These rulings reinforce international obligations which countries have in respecting human rights. The decisions have also placed freedom of association at the centre of debate in a way that suggests labour rights are justiciable insofar as they are perceived to be part of a public law framework – despite the view that courts do not enforce social rights.¹¹

What is implied throughout *Human Rights in Labor and Employment Relations* and other engagements of this topic is that human rights constitute a foundation upon which a more just workplace may be fashioned.

James Gross¹² "Takin' It to the Man: Human Rights at the American Workplace"¹³ offers a provocative commencement to the collection as he outlines why recognition of human rights throughout the US and the world "promises a new vision".¹⁴ This piece provides a good entry point for readers, especially those unfamiliar with the international human rights framework, as Gross canvasses not only the substantive content but also the dilemmas faced. For him, human rights as a theoretical and substantive concept have the potential to challenge the orthodoxy of labour law. The extent to which human rights can transform labour law appears to be monumental. Human rights may well better communicate the centrality of rights in social considerations regarding individuals and most particularly workers' rights. Nevertheless, a human rights analysis within labour law has its own limitations. For example, although the ruling in *BC Health Services* compelled the BC Government to discuss reorganization with BC health unions, it did not mandate successful collective bargaining on the issue; nor did it prevent the Government from acting as it saw fit regardless of the health unions' stance. Final decisions still rest with the employer. It is up to unions to compel the employer to factor in members' considerations. Gross' argument¹⁵ is all the more striking because he contends human rights provide a test by which labour law will be found deficient and, therefore, will be forced to improve. How would this occur? For example, governments are compelled by law (and international instruments) to protect the freedom of association, but they are not forced to promote collective bargaining. Since this is a matter traditionally left to the parties, it would seem unlikely that government would interfere. In order to enforce rights, unions have resorted to litigation. While there have been recent decisions which have rightly given reason for optimism, litigation does not ensure rights protection.

The title of Jeff Hilgert's contribution "A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right"¹⁶ contains the type of wording that underlines the unsteadiness of the ground traversed. This point is reinforced by his argument: "human rights can serve as the foundation for meaningful and objective industrial and labor relations scholarship."¹⁷ Hilgert asserts work-related injuries and illnesses are undercounted because three categories of data are missing from the government survey.¹⁸ He brings together many different examples of the ravages of workplace accidents; each one containing stark reminders of the perils present in contemporary workplaces. Hilgert advocates the explicit normative values of human rights writing (over those of institutional labour economics) as they provide the framework for a more intensive yet expansive discussion. Human rights compel policy, government and labour institutional evaluations based on human rights standards where social rights are entrenched in their social contexts as well as their interdependence with other human rights. The presumption is that human rights provide greater breadth of insight as this perspective questions the premises of labour economics. There seems to be little room for interaction between these

two perspectives according to Hilgert as "human rights analysis understands the state in all its forms and does not restrict its analysis to a narrow definition of labor institutionalism in a market context."¹⁹

In her essay "Employment Discrimination", Maria Ontiveros argues discriminatory conduct is also a violation of human rights.²⁰ She takes much from the alignment of discrimination with human rights found in article 7 of the Universal Declaration of Human Rights (UDHR).²¹ Her syllogism relies on work as a gateway to social participation: "paid employment is central to our current understanding of being a free human being and ..., in our current social system, it is central to the attainment of all other fundamental rights."²² This observation takes from the International Labour Organisation report, *Equality at Work: Tackling the Challenges* which links human rights and discrimination through the social and economic detriment violations inflict on productivity and social cohesion.²³ In order to give proper effect to the principles of protections to human rights and freedom from discrimination, Ontiveros contends American law must reform Title VII of the *Civil Rights Act* of 1964 (and abandon the restrictive Fourteenth Amendment approach). The reform of Title VII would seem to be part of a larger movement to change attitudes towards discrimination and human rights because Title VII only applies to companies with more than fifteen employees and excludes agricultural and domestic workers.

Three further contributions broaden the collection's reach by elaborating on human rights' pervasive potential. These are grouped together as they demonstrate how broad the scope of human rights and work extends. While these topics are no less important, they work together as they emphasize the moral tone of human rights. Burns Weston calls into question the continuing problem of child labour.²⁴ He cites the 1989 UN Convention of the Rights of the Child (CRC) as the starting point for engagement, but notes with disdain how the issue remains. The reason: the prevalence of certain economic and political forces in various countries throughout the world whose interests are not served by the eradication of child labour. He advocates a human rights based approach which would make "norms of non-discrimination, justice, and dignity ... central in all aspects of a working child's life"²⁵ coupled with employment of legal and extra legal means of protection promotion.²⁶ Rebecca Smith writes of migrant workers and forced labour.²⁷ Focusing on the United States, Smith provides illuminating examples. The 2002 decision of the US Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labour Relations Board*²⁸ set a startling precedent: employers of unauthorised workers may unlawfully terminate these individuals and these workers have no legal entitlement to back pay because of their unauthorised work status. Similarly the 2008 immigration raid at Agriprocessors in Postville, Iowa further demonstrates how work status trumps human rights. These incidents suggest that claimants must qualify in order to have their rights protected. The point is underlined in American discrimination law where non-citizens and citizens have been treated differently in certain instances.²⁹ Human rights in the workplace are here treated as a claim and not as a right.³⁰ Susanne Bruyere and Barbara Murray close out the collection with a discussion of disability and human rights.³¹ They note several areas in need of urgent attention. Starting with the "invisibility of persons with disabilities"³² in the three instruments of the

International Bill of Human Rights, the authors trace the loss to employers of these willing individuals. Bruyere and Murray end on a note of optimism that there may be a much more progressive change in the offing.

Two further contributions offer much for employment relations specialists to consider. In "Human Rights and Sustainability: A Corporate Perspective", Edward Potter and Marika McCauley Sine,³³ posit three social expectations which must be met in order to achieve corporate sustainability. First, a business should enhance the sustainability of the community it serves. Second, business must align its efforts with those of the relevant government and other local actors. Third, the business must be a "functioning part of every community in which it operates."³⁴ The authors outline various voluntary initiatives by companies, such as codes of conduct. The complicating factor for companies has been that many operated in areas where government was weak (though some may suggest that companies sought out these countries for this reason) and so operations included not only business management but also absorbing some state responsibilities.³⁵ John Ruggie's "Promote, Respect and Remedy"³⁶ is relied upon as a basis for sustainable progress, especially his instruction that "states have a duty to protect rights, that companies have a responsibility to respect rights, and that access to remedies for victims of human rights abuses must be greatly strengthened."³⁷ As they look ahead, the authors find much room for optimism as "companies will increasingly recognize the opportunities posed by recognizing and respecting human rights."³⁸

Of particular interest to employment relations has been freedom of association as it "fuses the entitlement to form and belong to a collective association ... with the notion of individual freedom."³⁹ Couching the right within the traditional imbalance of bargaining power analysis, Tonia Novitz sketches the history surrounding trade unions' purposes and business' fear that these organizations would upset power relations. She observes two noted areas of contention in freedom of association literature: whether there is a positive and negative right to belong and not to belong to a trade union; and whether the freedom of association extends to acting collectively. Regarding the first dilemma, she criticizes its construction suggesting that considerations should include the effect on others and not just the right on its own. Novitz' argument focuses on the impact on workplace issues; that is, the difference between a strong union and a weak one. The effect of the right has been the essence of the dilemma; especially since the focus on impact invokes the common critiques which are usually aimed at the negative impact of industrial action, such as upsetting of the "fabric of society".⁴⁰ Situating the discussion within the state's obligations to protect rights, her observation that freedom of association must be viewed as "multifaceted" – meaning that it is all of a civil, political and socioeconomic right – best ties together the notion of effect with the exercise of the freedom. The protective framework of the freedom is paramount: what effect does a government decision have on workers' election to exercise the right as they wish. Assessing these considerations, Novitz posits litigation of human rights (as a means of protecting members' interests) may not be "most successful in terms of gaining additional protection for participation by workers' organizations in collective bargaining."⁴¹

Part of the value of this collection is its platform to further considerations. One observation of this collection is that different jurisdictions are at different stages of acceptance of human rights. Canada and the United States are cultures of greater awareness of human rights. The United Kingdom, as one comparator, has only recently passed the Human Rights Act (in 1998) which brought into domestic law the European Convention on Human Rights – several decades after the Convention initially came into existence. While relatively junior in its own history, Canada has rapidly developed a body of case law which investigates the intricacies of human rights. The United Kingdom shows no signs of similarly quick movement. This is best demonstrated by the English Court of Appeal's decision in *Metrobus Ltd. v. UNITE* which categorised the right to strike as not "much more than a slogan or a legal metaphor."⁴² There is greater consistency in how the government permits private power "to interfere with a human right, such as the right to freedom of association."⁴³ Furthermore, in a number of instances the UK highest court (now the Supreme Court) has been overruled by the European Court of Human Rights in Strasbourg; affirming rights which the UK courts did not. While not in itself a ground-breaking notion, absence of conformity regarding human rights suggests not only differing points of view but also hints at a barrier to their widespread recognition. As noted by Weston, there are jurisdictions in which recognition of human rights runs contrary to national economic interests. Although the mobilisation of shame⁴⁴ has been successful in highlighting human rights abuses, these campaigns gain traction because the violations are most egregious. For those involved in industrial relations especially in industrialised nations, the arguments remain more subtle and therefore less likely to form the substance of shaming campaigns. Furthermore, these campaigns are often launched in the third sector,⁴⁵ thereby underlining how human rights advocacy often operates outside of the "normal" framework.

The fit between human rights and labour relations requires some conceptual massaging. First, the two movements have only recently intersected with each other. For the labour movement, the human rights torch was lit as the trade union flame flickered. Most notably in the United States, trade union membership has experienced monumental decline as unions struggled to protect their members under the antiquated Wagner Act regime. As unions have lost "organic solidarity",⁴⁶ championing human rights became a strategic⁴⁷ response⁴⁸ as much as a principled one. This comment is not intended to impugn unions. Instead, its purpose is to highlight how the union movement has been forced to adapt. It learned about human rights and, as the cases mentioned above attest, they have learned how the two can intersect. Second, speaking in the language of human rights does not guarantee the recognition of labour rights. Within the labour relations context, it may be argued that labour rights are granted and are not inherent. Workers qualify for certain rights – as the United States Supreme Court ruled in *Hoffman*. Human rights instruments, such as the UDHR, contain no such pre-requisite: an individual "qualifies" because she is human. The right is inherent. Third, adopting a human rights focus in employment relations presumes ideological symmetry. Human rights as a movement has not been as focused on challenging economic relationships in society⁴⁹ and has been more "internationally oriented".⁵⁰ Labour as a movement has struggled with economic

considerations. It seeks not only protection of rights but also a seat for workers at the decision-making table. It has been Labour has a less international focus at the local branch level.⁵¹

One of the fundamental purposes of any labour relations regime is to render viable on a continuing basis the relationship amongst parties who may be in opposing positions but nonetheless must maintain good relations. It remains a consideration as to how a framework of sustainable human rights (political, civil and socioeconomics) protections in employment relations may be achieved; as opposed to a patchwork of recognition without much more.

David Mangan

London School of Economics & Political Science

Notes

- 1 James A. Gross & Lance Compa, eds. (Champaign, Labor and Employment Relations Association, 2009) [*Human Rights in Labor and Employment Relations*].
- 2 James A. Gross & Lance Compa, "Introduction" in *Human Rights in Labor and Employment Relations*, pp. 1-11, p. 1.
- 3 Virginia A. Leary, "The Paradox of Workers' Rights as Human Rights" in Lance A. Compa and Stephen F. Diamond (eds.) *Human Rights, Labor Rights, and International Trade* (Philadelphia, University of Pennsylvania Press, 1996), pp. 22-47 [Leary], p. 22.
- 4 David M. Beatty, "Labour is Not a Commodity" in Barry J. Reiter and John Swan, *Studies in Contract Law* (Toronto, Butterworths, 1980), pp. 313-355, p. 324.
- 5 This dissection has been noted also by Kevin Kolben, "Labor Rights as Human Rights?" (2010) 50 *Virginia Journal of International Law* 449 [Kolben], p. 453.
- 6 *Report of the Director-General: Decent Work* (Geneva, ILO, 1999). <[http://www2.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#Human rights and work](http://www2.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#Human%20rights%20and%20work)>.
- 7 2007 SCC 27 [*BC Health*].
- 8 (2008), 92 O.R. (3d) 481 (C.A.), leave to appeal to Supreme Court of Canada granted April 2, 2009 and judgment was reserved after the hearing on December 17, 2009 [*BC Health Services*].
- 9 Case no. 34503/97.
- 10 *Ibid.*, para. 154.
- 11 Judy Fudge, "The New Discourse of Labor Rights: From Social to Fundamental Rights" (2007) 29 *Comparative Labor Law and Policy Journal* 29 [Fudge], p. 48.
- 12 Who has elsewhere argued that the values which culminated in the Wagner Act were human rights: James Gross, "Workers Rights as Human Rights: Wagner Act Values and Moral Choices" (2002) 4 *University of Pennsylvania Journal of Labor & Employment Law* 479.
- 13 James Gross, "Takin' It to the Man: Human Rights at the American Workplace" in *Human Rights in Labor and Employment Relations*, pp. 14-41 [Gross].
- 14 *Ibid.*, p. 14.
- 15 *Ibid.*
- 16 Jeff Hilgert, "A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right" in *Human Rights in Labor and Employment Relations*, pp. 43-71.
- 17 *Ibid.*, p. 44.
- 18 *Ibid.*, p. 46.
- 19 *Ibid.*, p. 56.

- 20 Maria L. Ontiveros, "Employment Discrimination" in *Human Rights in Labor and Employment Relations*, pp. 195-212 [Ontiveros].
- 21 *Universal Declaration of Human Rights*, GA Res. 217 (III) of Dec. 10, 1948.
- 22 Ontiveros, p. 197.
- 23 International Labour Organisation, *Equality at Work: Tackling the Challenges*. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. International Labour Conference, 96th Session 2007 Report I (B). Geneva: International Labour Office, p. 7.
- 24 Burns H. Weston, "Child Labor in Human rights Law and Policy Perspective" in *Human Rights in Labor and Employment Relations*, pp. 73-122.
- 25 *Ibid.*, p. 81.
- 26 *Ibid.*, pp. 99 ff.
- 27 Rebecca Smith, "Prosecute, Prevent, Protect: Migrant Labor, Forced Labor and Human Rights" in *Human Rights in Labor and Employment Relations*, pp. 155-180.
- 28 535 U.S. 137 (2002).
- 29 For example in *Espinoza v. Farrah Mfg.*, 414 U.S. 86 (1973).
- 30 A distinction Leary points out, p. 26.
- 31 Susanne M. Bruyere & Barbara Murray, "The Human Rights of Workers with Disabilities" in *Human Rights in Labor and Employment Relations*, pp. 213-234.
- 32 *Ibid.*, p. 214.
- 33 Edward Potter & Marika McCauley Sine, "Human Rights and Sustainability: A Corporate Perspective" in *Human Rights in Labor and Employment Relations*, pp. 181-194 [Potter & McCauley Sine].
- 34 *Ibid.*, p. 182.
- 35 *Ibid.*, p. 188.
- 36 John Ruggie, "Promote, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3 *Innovations* 189.
- 37 Potter & McCauley Sine, p. 189.
- 38 *Ibid.*, p. 193.
- 39 Tonia Novitz, "Workers' Freedom of Association" in *Human Rights in Labor and Employment Relations*, pp. 123-154.
- 40 *Ibid.*, p. 125.
- 41 *Ibid.*, p. 149.
- 42 [2009] EWCA Civ 829, para. 118.
- 43 Gross, p. 31.
- 44 R. Drinan, *The Mobilization of Shame* (New Haven and London, Yale University Press, 2001).
- 45 Gross and Compa also note the work of the third sector at p. 3.
- 46 Simon Deakin, "Social Rights in a Globalized Economy" in Philip Alston (ed.) *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005) pp. 25-60, p. 60.
- 47 Kolben, p. 461, calls it "pragmatic."
- 48 Fudge, p. 32, calls it a response to "the new phase of market expansion associated with globalization and neo-liberalism."
- 49 Kolben, p. 484.
- 50 Leary, p. 27.
- 51 *Ibid.*